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HEW KUAN YAU v. MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-531-11-2019]
20 MAY 2024

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Abstract – *For a successful claim of damages under O. 53 r. 5 of the Rules of Court 2012, (i) the claim for damages must be pleaded with the same particularity as pleading an ordinary action in the O. 53 statement; (ii) the claim for damages must arise from a successful judicial review application; (iii) a claim for damages cannot succeed if it is merely grounded on the basis that there has been an infringement of the principles of administrative law by the decision-maker; and (iv) the wrongful act or infringement of the principles of administrative law found would be such as to constitute a recognised private law action for damages.*

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ADMINISTRATIVE LAW: *Judicial review – Damages – Assessment – Minister of Internal Affairs ('Minister') issued prohibitory order banning comic book authored by applicant – Minister's decision quashed by order of certiorari – Approach to be taken in assessing damages sought in successful judicial review application – Whether claim for damages recognised tort in private law – Whether claim for damages pleaded with sufficient clarity – Whether prerequisites under O. 53 r. 5 of Rules of Court 2012 satisfied – Whether statutory requirements complied with*

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This case concerned the assessment of damages sought by the applicant where the decision of the Minister of Internal Affairs ('Minister') issuing a prohibitory order under s. 7(1) of the Printing Presses and Publications Act 1984 banning a comic book authored by the applicant was quashed by an order of *certiorari.* The comic book purportedly explained and praised the 'Belt and Road initiative' of the People's Republic of China and was published in 2019 and distributed to schools. The Minister banned and seized the said comic books as they were said to have: (i) been published with the intention of promoting the ideology of communism and socialism; (ii) spread wrong and confusing facts about the communists while trying to raise support and sympathy towards the communist struggle; and (iii) caused readers especially the younger generation to question the history of Malaysia and disputed the struggles of past leaders/icons in fighting for independence and nation building. The applicant challenged the prohibitory order by way judicial review in the High Court. The High Court held in favour of the Minister. The Court of Appeal reversed the High Court decision in the ensuing appeal and ordered that the prohibitory order issued by the Minister be quashed and allowed the prayer that damages be assessed as pleaded in the application for judicial review, under O. 53 r. 5 of the Rules of Court

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2012 ('ROC'). The pleading on the claim for damages as set out in the applicant's O. 53 statement, stated that: (i) the applicant had suffered damages and losses as a result of the bad publicity in the media caused by police investigations in offences under the Sedition Act 1948 and the Multimedia and Communications Act 1988; and (ii) following the issuance of the prohibitory order by the Minister, the applicant had resigned from his position as the Chief Executive Officer ('CEO') of the Malaysia-China Business Council. As a result, the applicant claimed the following general damages for losses of: (i) earnings and future earnings until 2030 and benefits as a result of having to resign as the CEO; (ii) reputation; and (iii) opportunity to obtain business opportunities and appointment to any Government agencies both at the Federal and State levels. The applicant further argued that the claim of damages predicated on conspiracy, defamation, malicious falsehood, breach of statutory duty and misfeasance in public office had been established by the decision of the Court of Appeal when allowing the prayers sought by the applicant.

Held (dismissing application):

(1) Before the exercise of calculating the appropriate damages could be carried out, the conditions of O. 53 of the ROC must first be satisfied, in particular the claim for damages constituting a recognised tort in private law had been pleaded, and pleaded with particulars as required in private law. The applicant's O. 53 statement however, did not plead the prerequisites of O. 53 r. 5(1)(a) and (b) of the ROC, in particular that the Minister's infringements of administrative law principles constituted a recognised tort. In fact, no recognised tort in private law was pleaded. All that was pleaded was that the applicant was entitled to general damages pleaded for having to resign as the CEO. There was thus a serious deficiency in the pleadings. The applicant's further act of filing the notice of application to amend was indicative of the fact that he had become aware that the pleadings in the O. 53 statement on the claim for damages was seriously deficient for non-compliance of O. 53 r. 5(1) and (2). The claim for damages would fail and was therefore dismissed. (paras 26, 29, 30 & 32)

(2) As the prerequisites of O. 53 r. 5 of the ROC were not satisfied, that warranted the claim for damages be dismissed. The administrative infringement found committed by the Court of Appeal in its judgment (reversing the High Court decision which had dismissed the application for judicial review) did not satisfy the ingredients of the recognised torts said to be proven. The reasons given by the Court of Appeal would determine whether a tort in private law was proven or not. The reasons of the Court of Appeal did not constitute any of the recognised torts put forth by the applicant. An assessment of damages exercise is not confined to merely calculating the figures to constitute damages but also

to see whether the threshold of O. 53 r. 5 of the ROC had been satisfied as a juridical issue. The applicant's claim of damages predicated on conspiracy, defamation, malicious falsehood, breach of statutory duty and misfeasance in public office was not established by the decision of the Court of Appeal when allowing the prayer sought by the applicant had not satisfied O. 53 r. 5 of the ROC. The assessment of damages was misconceived in law. (paras 35, 36 & 70)

Case(s) referred to:

E v. K [1995] 2 NZLR 239 ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor [2010] 9 CLJ 46 HC ***(refd)***

Groves v. Wimborne [1898] 2 QB 402 ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Ketua Setiausaha Kementerian Dalam Negeri & Anor v. The Edge Communications Sdn Bhd [2017] CLJU 713; [2017] 1 LNS 713 CA ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729 FC ***(refd)***

Three Rivers District Council And Others v. Governor And Company Of The Bank Of England (No 3) [2003] 1 AC 1 ***(refd)***

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***

Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Imigresen Malaysia & Yang Lain [2020] 7 CLJ 621 CA ***(refd)***

X (Minors) v. Bedfordshire County Council [1995] 2 AC 633 ***(refd)***

Legislation referred to:

Printing Presses and Publications Act 1984, ss. 7(1), 8(2)

Rules of Court 2012, O. 18 r. 12, O. 53 rr. 3(2), 5(1)(a), (b), (2)

For the applicant - Shamesh Jeevaretnam & Vince Tan Hoo Seh; M/s Jeeva Partnership
For the respondents - Nur Irmawatie Daud SFC & Ng Wee Li; FC

Reported by Lina E

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This judgment concerns the approach to be taken in assessing damages sought in a successful judicial review application. The case concerns the assessment of damages sought by the applicant where the decision of the Minister of Internal Affairs ("Minister") issuing a prohibitory order under s. 7(1) of the Printing Presses and Publications Act 1984 ("the PPPA") banning a comic book authored by the applicant was quashed by an order of *certiorari.*

[2] Initially, the High Court had dismissed the application for judicial review. The Court of Appeal reversed the High Court in the ensuing appeal and ordered that the prohibitory order issued by the Minister be quashed by an order of *certiorari* and allowed the prayer that damages be assessed as pleaded in the application for judicial review. The prayer for damages was made pursuant to O. 53 r. 5 of the Rules of Court 2012 (hereinafter all rules mentioned refer to the Rules of Court 2012 unless stated otherwise).

[3] The assessment was carried out by way of affidavit evidence and after reading the affidavits and written and oral submission of the parties, I made the following orders in respect of special damages sought by the applicant:

(i) refusing the claim of RM1,048,000 loss of earnings (salary at RM8,000 a month from October 2019 to August 2030) as Chief Executive Officer ("CEO") of the Malaysia China Business Council;

(ii) refusing the claim of RM88,000 accumulated bonuses for 11 years (from 2020 to 2030);

(iii) allowing costs of legal fees of RM51,140.000 at the High Court, Court of Appeal, and the Federal Court based on invoices and receipts;

(iv) refusing the claim of RM2,718 as court filing fees at the High Court, Court of Appeal and the Federal Court;

(v) refusing the claim of RM1,000 as the Court of Appeal costs after it was withdrawn; and

(vi) allowing the claim of RM325 as the cost of 13 comic books (at RM25 per comic book).

[4] I also refused general damages, aggravated damages, and exemplary damages sought for the following causes of action in private law put forth by the applicant (see applicant's executive summary – encl. 58): (i) misfeasance in public office; (ii) defamation; (iii) malicious falsehood; (iv) conspiracy to injure; and (v) breach of statutory duty.

Background

[5] I begin with the background leading to the instant application of assessment of damages before me.

[6] The applicant is the author of a comic book that purportedly explained and praised the "Belt and Road Initiative" (BRI) of the People's Republic of China. The comic book was published on 18 April 2019 and distributed to mainly schools. Six months later, on 23 October 2019, the Minister for Home Affairs ("the Minister") banned the comic book *vide* a prohibitory order made and published as required under s. 7(1) of the PPPA. As a result of the prohibitory order, the comic books were seized from various organisations and schools that had received the comic books.

[7] The reasons for the ban were given in a press statement and are as follows: (i) the comic book was published with the intention to promote the ideology of communism and socialism; (ii) the comic book spreads wrong and confusing facts about communist while trying to raise support and sympathy towards the communist struggle; and (iii) the comic book causes readers especially the younger generation to question the history of Malaysia and disputes the struggles of the past leaders/icons in fighting for independence and nation building.

[8] The applicant challenged the prohibitory order by way of judicial review at the High Court on the following grounds:

(i) the decision was unreasonable as the contents of the comic book do not fall within the ambit of s. 7(1) of the PPPA;

(ii) there was insufficient evidence to support the conclusion that the comic book is likely to be prejudicial to public order, security or alarm public opinion;

(iii) the decision was made in bad faith and tainted with bias;

(iv) the decision was disproportionate;

(v) the applicant was not given a right to be heard before the prohibitory order was issued; and

(vi) that s. 7(1) of the PPPA was unconstitutional.

[9] The Minister averred that he formed the opinion that the book is likely or has the potential to prejudice public order by causing racial conflict after considering the available material placed before him which he reproduced in his affidavit in reply opposing the application. The learned judge of the High Court, after reviewing the facts objectively, found there was an evidentiary basis for the Minister to conclude that the book was likely to be prejudicial to public order and that the applicant had not brought his case within the established grounds of illegality, irrationality, proportionality, and procedural impropriety what more the complaint of bad faith and bias. The learned judge also said that under s. 7(1) of the PPPA, the Minister has "absolute discretion" to issue a prohibitory order and as such cannot be said to have committed an error of law. Section 7(1) of the PPA statutorily requires the issuance and gazetting of the prohibitory order.

[10] The appellant appealed to the Court of Appeal. For its importance, the grounds of appeal for determination were listed by the Court of Appeal as follows:

(i) whether the decision of the Minister under s. 7 of the PPPA is subject to judicial review?

(ii) if so, to what extent can it be examined on the merits?

(iii) whether the High Court is correct in holding that there was a proper exercise of ministerial discretion on the facts? A

(iv) whether a right of hearing must be accorded before banning the book?

(v) whether s. 7 of the PPPA should be struck down as unconstitutional?

[11] It is abundantly clear that there was no ground of appeal pleaded that the Minister had acted in bad faith or that his decision was tainted with bias when making the prohibitory order. B

[12] In respect of the first ground of appeal, the Court of Appeal held that the "absolute discretion" accorded to the Minister under s. 7(1) of the PPPA is reviewable though readily agreeing that in matters concerning public order or national security, a greater deference should be paid to the opinion of the Minister. C

[13] In respect of the second ground of appeal, the Court of Appeal held that the High Court is not precluded from examining the evidence to determine whether the decision to ban the comic book, though legal in the sense that the Minister was empowered to do so under s. 7(1) of the PPPA, was nonetheless an irrational exercise of power in that a similarly circumstanced Minister would not have arrived at the same decision. D

[14] In respect of the third ground, the Court of Appeal, on an objective examination of the facts before the Minister including examining the contents of the comic book found no evidence that suggested prejudice to public order or likelihood thereof that permitted the invocation of the power under s. 7(1) of the PPPA. The fact that the comic book was in circulation for some six months before it was banned with no untoward incident occurring was telling against the fear of the Minister that the book was prejudicial to public order. The Court of Appeal held that the exercise of discretion of the Minister was irrational in the sense that a similarly circumstanced Minister would not have made the same decision to issue the prohibitory order. E F

[15] In respect of the fourth and fifth grounds of appeal, the Court of Appeal held that they were not prepared to quash the decision to issue the prohibitory order on the ground that the right to be heard was not given and that s. 7(1) of the PPPA was not unconstitutional respectively. G

[16] As a result, the Court of Appeal on 6 July 2022 granted prayers (i), (ii), (iii), (v) and (vi) in the application for judicial review (encl. 1). Prayer (v) was for the return of the comic books while prayer (vi) was for damages to be assessed. H

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Decision Of The Court

A Claim Of Damages Under Order 53 Rule 5

[17] The claim for damages was made under O. 53 r. 5. The starting point would be the reproduction of the rule which provides as follows:

(i) on an application for judicial review the court may, subject to para. (2), award damages to the applicant if:

(a) he has included in the statement in support of his application for leave under r. 3 a claim for damages arising from any matter to which the application relates; and

(b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(ii) Order 18 r. 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

[18] It is clear from the phraseology of O. 53 r. 5(1)(a) that the claim for damages must be joined in the statement in support of the application for leave under O. 53 r. 3(2) ("the O. 53 statement"). Order 53 r. 5 is devised such that in judicial review proceedings apart from granting the public law remedy sought the court could in the same proceedings if so joined, consider granting a claim for damages in private law. The condition is that the claim for damages must arise from the matter to which the judicial review application relates.

[19] It is also clear from the phraseology of O. 53 r. 5(1)(b) that the claim for damages must be the type in which he could have been awarded damages by way of a private law action. In other words, the claim for damages envisaged in O. 53 r. 5 is a recognised tort in private law. It is made very clear by O. 53 r. 5(2) that the claim for damages is subject to O. 18 r. 12. This means that a claim for damages must be pleaded and pleaded with sufficient particularity in the O. 53 statement before it can be considered. Order 18 r. 12 read as follows:

> (i) Subject to para. (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default, or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention, or other condition of mind except knowledge, particulars of the facts on which the party relies.

[20] The phrase "necessary particulars of any claim" means that the applicant is required to plead in the O. 53 statement the recognised tort or breach of contract in private law and to provide particulars if any "malice" or "other condition of mind" is relied on. In this regard, Gordon, *Judicial Review and Crown Office Practice (1999)* adopted by the Court of Appeal in *Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Imigresen Malaysia & Yang Lain* [2020] 7 CLJ 621 is instructive, as there it was said as follows:

> Where damages are sought they must be pleaded with the same particularity as in an ordinary action ... The inclusion of such a remedy on judicial review is a concession to procedural convenience.

[21] The Court of Appeal in Wang Choon Yin also adopted the following principle established by Mohamad Ariff Yusof J (as His Lordship then was) in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2010] 9 CLJ 46:

> [19] It then appears that a claim for damages in a judicial review application cannot be grounded only on the basis that there has been merely an infringement of the principles of administrative law. The application has to proceed further and establish that he has a right to damages at private law if initiated in an ordinary action.

[22] The right to damages in private law means any cause of action in private law that entitles a person or body to make a claim for damages. It is trite that a cause of action for damages in private law is usually a recognised tort or involves a breach of contract. In this regard, the learned author Clive Lewis in *Judicial Remedies in Public Law*, 5th edn, Sweet & Maxwell said and I quote:

> An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by public bodies. Decisions or measures which are *ultra vires* do not of itself entitle the individual to damages for any loss suffered. **Any individual must establish that the unlawful action also constitutes a recognized tort or involves a breach of contract**.
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> (emphasis added)

[23] Based on the authorities, the prerequisites for a successful claim for damages under O. 53 r. 5 can be summarised thus:

(i) the claim for damages must be pleaded with the same particularity as pleading an ordinary action in the O. 53 statement (in accordance with O. 18 r. 12);

(ii) the claim for damages must arise from a successful judicial review application;

(iii) a claim for damages cannot succeed if merely grounded on the basis that there has been an infringement of the principles of administrative law by the decision maker; and

(iv) the wrongful act or infringement of the principles of administrative law found would be such as to constitute a recognised private law action for damages.

[24] Only after the prerequisites as summarised above are satisfied that the calculation to determine the appropriate figures to constitute damages can then be carried out. This is clear as the case before me is on all fours with the decision of the Court of Appeal in *Ketua Setiausaha Kementerian Dalam Negeri & Anor v. The Edge Communications Sdn Bhd* [2017] CLJU 713; [2017] 1 LNS 713, where the Court of Appeal ordering damages to be assessed said:

> An assessment of damages exercise is not confined to merely calculating the figures to constitute damages. It is, therefore, our considered view, that the issue of whether the applicant had come within the bounds of Order 53 rule 5(1)(b) was a juridical issue to be determined at the hearing of the assessment of damages.

[25] The rationale for the amendment to O. 53 to include a claim for damages which did not exist in the earlier O. 53 was stated by Michael Supperstone and James Goudie, *Judicial Review* (1997) as follows:

> The new RSC Ord. 53 is a reform concerned with remedies and with public law, not extending, or diminishing, substantive rights in private law. It creates no new cause of action. It enables a claim for damages for breach of a private law duty resulting from unlawful conduct by a public authority to be joined with a public law application to establish the unlawfulness rather than being claimable only in an action begun by writ. That is of value because it avoids the instigation of duplicate proceedings.

[26] According to a case of *The Edge Communications Sdn Bhd* (above) before, I can carry out the exercise of calculating the appropriate damages, I must first be satisfied that the conditions of O. 53 r. 5 have been satisfied, in particular, the claim for damages constituting a recognised tort in private law has been pleaded and pleaded with particulars as required in private law. The failure would be a defective claim for damages depriving this court of the jurisdiction to grant damages.

[27] In view of the above, it becomes necessary to scrutinise the claim for damages as pleaded by the applicant in the O. 53 statement. This is to see whether it has been pleaded that the infringements of administrative law principles by the Minister constitute a recognised action in private law sounding in damages and where required that particulars are pleaded.

Whether The Conditions Of Order 53 Rule 5 Satisfied

[28] What is the claim for damages in private law pleaded by the applicant? The pleading on the claim for damages is set out in paras. 6.1 to 6.5 of the O. 53 statement. It merely states that the applicant has suffered damage and losses as a result of the bad publicity generated in the media caused by his investigation by the police on 18 October 2019 into offences under the Sedition Act 1948 and the Multimedia and Communications Act 1988 followed with the issuance of the prohibitory order (*ie*, on 28 October 2019) by the Minister he resigned from the position as Chief Executive Officer ("CEO") of the Malaysia – China Business Council ("MCBC") caused by the adverse publicity in the media. As a result, he claimed the following general damages:

(i) loss of earnings and future earnings until 2030 and benefits as a result of having had to resign as CEO;

(ii) loss of reputation; and

(iii) loss of opportunity to obtain business opportunities and appointment to any government agencies both at the Federal and State levels.

[29] It is clear, that the O. 53 statement was not pleaded the prerequisites of O. 53 r. 5(1)(a) and (b), in particular, that the Minister's infringements of administrative law principles constituted a recognised tort. In fact, no recognised tort in private law was pleaded. All that was pleaded was that the applicant is entitled to general damages pleaded for having to resign as CEO. Even, if I took the infringements committed by the Minister as found by the Court of Appeal for quashing the prohibitory order, it is not sufficient to sound a claim for damages. As stated by Mohamad Ariff Yusof J in *Empayar Canggih Sdn Bhd*:

> [19] It then appears that a claim for damages in a judicial review application cannot be grounded only on the basis that there has been merely an infringement of the principles of administrative law.

[30] Thus, there was a serious deficiency in the pleadings. It was no wonder or no surprise at all, that the applicant, at a very late stage of the proceedings, filed a notice of application (encl. 62) on 13 September 2023 to amend the O. 53 statement to plead two private law actions in tort to prop up his claim:

(i) misfeasance in public office; and

(ii) defamation

caused by the prohibitory order and the press release which contained the reasons for issuing the prohibitory order. The amendment was to show that the reasons stated in the press statement were false, and the prohibitory order together with the press statement were issued *mala fide*, to specify the recognised tort in private law and the particulars thereof.

[31] The notice of application to amend was dismissed by me for various reasons. The dismissal of the notice of application does not concern this judgment as there was no appeal against my decision there. The only appeal against my decision is against the damages I did not allow (as shown in para. [3] above), namely, (i) the loss of income of RM1,048,000 loss of earnings (salary at RM8,000 a month from October 2019 to August 2030); (ii) the claim of RM88,000 as accumulated bonuses; (iii) general damages; (iv) aggravated damages; and (v) exemplary damages.

[32] However, the act of filing the notice of application to amend is indicative of the fact that the solicitors of the applicant had become aware that the pleadings in the O. 53 statement on the claim for damages was seriously deficient for non-compliance of O. 53 r. 5(1) and (2). There was nothing pleaded to say that the grounds of review *ie*, infringement of administrative law principles by the Minister wound constitute a recognised tort in private law resounding in the damages.

[33] On the above reason, the claim for damages would fail. The claim for damages is therefore dismissed.

The Actionable Torts

[34] It was submitted in the applicant's written submission and the executive summary that actionable torts in private law were proven, and that the applicant was therefore entitled to have his damages assessed. The torts in private law alleged proven were: (i) conspiracy to injure; (ii) breach of statutory duty; (iii) malicious falsehood; (iv) misfeasance in public office; and (v) defamation.

[35] I was unable to agree with this submission. First, as I had already decided in the preceding paragraphs that the prerequisites of O. 53 r. 5 were not satisfied, and that warranted the claim for damages be dismissed.

[36] The second reason for dismissing this submission was that the administrative infringement found committed by the Court of Appeal in its judgment (reversing the High Court which had dismissed the application for judicial review) did not satisfy the ingredients of the recognised torts said to be proven. The reasons given by the Court of Appeal will determine whether a tort in private law is proven or not. I found that the reasons of the Court of Appeal did not constitute any of the recognised torts put forth by the applicant. The above would form my second ground for dismissing the claim for damages.

Conspiracy To Injure

[37] This head of a claim was withdrawn during oral submissions. In my mind, rightly so, as the elements for the tort of conspiracy did not even feature in the applicant's grounds. There were, in fact, no meetings of minds by two or more persons to injure the applicant. The applicant sought to

challenge the decision of the Minister who was the sole decision maker according to the affidavits and the documentary evidence. Since the claim under this head was withdrawn, the same is dismissed.

Breach Of Statutory Duty

[38] The applicant submitted that the claim for breach of statutory duty is proven. The submission made was as follows:

(i) where the Minister abuses his power and maliciously invokes s. 7(1) of the PPPA with malice, then it amounts to a breach of statutory duty (para. 87 of the applicant's written submissions); and

(ii) where the prohibitory order was issued in bad faith for the Minister's own self interest then the Minister has breached his statutory duty (para. 1.5 of the applicant's executive summary).

[39] I found both submissions incomprehensible and had nothing to do with the tort of breach of statutory duty. As such, I dismissed the submission as devoid of merit. It is to be noted that the section under which the Minister issued the prohibitory order was s. 7(1) of the PPPA. This section does not impose a statutory duty on the Minister. The section confers a statutory discretionary power on the Minister.

[40] It is elementary that before there can even be a tort of breach of statutory duty there must be a statutory duty imposed by statute. There must be a duty first before that duty can be breached. When considering a claim for breach of statutory duty the precise formulation of the statutory provision is in question. The language of the statute must impose an unqualified statutory obligation or a statutory prohibition or statutory command on the defendant for a statutory duty to exist *(Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663; *E v. K* [1995] 2 NZLR 239; *Groves v. Wimborne* [1898] 2 QB 402).

[41] However, the language of s. 7(1) of the PPPA is as follows:

> **If the Minister is satisfied** that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, **he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed**, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.
>
> (emphasis added)

[42] The language of s. 7(1) of the PPPA *ie*, "if the Minister is satisfied ... he may in his absolute discretion" confers a power and certainly nothing that resembles a duty. Further, if a statutory duty exists and is breached then two other ingredients must be proven according to the case of *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633 as follows:

> However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that *the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty*.
> (emphasis added)

[43] In the instant case, the basic ingredient of the tort of breach of statutory duty, that is to say, the language of the statute provides duty is not present in s. 7(1) of the PPPA. Thus, no tort of breach of statutory duty exists if there is no duty provided by statute. The claim for breach of statutory duty was clearly misconceived in law, it has no basis whatsoever, and for that reason dismissed.

Malicious Falsehood And Defamation

[44] The press statement dated 23 October 2019 is the nub of the claim for damages predicated on the tort of malicious falsehood and defamation as submitted in the applicant's written submissions as follows:

(i) the explanation given (*ie*, reasons provided for issuing the prohibitory order) by the Minister in the press statement was false and had subjected the applicant to public hatred, public criticism, ridicule, other negative comments, opinions, and vilification (para. 17.2 of the applicant written submissions);

(ii) the press statement was both defamatory and maliciously false and in the premises, the tort of defamation and malicious falsehood has been established (para. 31 of the applicant's written submissions);

(iii) the Court of Appeal finding that the reasons provided for issuing the prohibitory order were unjustified and, on this premise, "the press statement contained inaccurate contents and had defamed the applicant" (para. 66 of the applicant's written submissions);

(iv) the press statement contains statements that are maliciously false and therefore the tort of malicious falsehood applies (paras. 71,73, 74, 75 & 76 of the applicant's written submissions);

(v) there is no possible defence that can succeed in light of the findings of the Court of Appeal and the respondents have failed to rebut the applicant's averments (paras. 77 of the applicant's written submissions); and

(vi) as a result of the Minister's actions the applicant suffered a loss of reputation and is entitled to damages (paras. 78 of the applicant's written submissions).

[45] I am unable to agree with the submission. The findings of the Court of Appeal do not constitute a case for malicious falsehood or defamation. For a wrongful decision to sound in damages in judicial review proceedings, this court must be satisfied, that, had the applicant brought an action in private law he would have been awarded damages. It was, thus, incumbent on the applicant to demonstrate that the findings of the Court of Appeal would constitute a recognisable tort in private law as required by O. 53 r. 5(1)(b) (see the decision of the Court of Appeal in *The Edge Communications Sdn Bhd* case (see para. [25] above).

[46] It is therefore critical to identify the findings made by the Court of Appeal when making the decision to quash the prohibitory order. The reasons for issuing the prohibitory order are housed in the press statement. Therefore, it is necessary to look at the press statement before identifying the findings of the Court of Appeal.

The Press Statement

[47] The press statement begins with informing the public at large that a prohibitory order has been issued. It then proceeds to state the grounds on which the Minister made the prohibitory order, to wit, that the content of the comic book is "likely to be prejudicial to public order" and also, "likely to alarm public opinion" (para. 3). The Minister was satisfied that the contents of the comic book (paras. 4 & 5):

(i) tended to promote the ideology of communism and socialism;

(ii) would spread inaccurate and confusing facts about communism, as well as, raise support and sympathy for the communist struggle;

(iii) would cause readers, especially, the younger generation, to question the history of Malaysia and the struggles of the country's past leaders for independence and nation building; and

(iv) failed to consider the sensitivities of Malaysians which are made up of diverse races and religions and may be detrimental to national unity and harmony.

[48] The Minister issued the prohibitory order against the comic book which was required to be gazetted under s. 7(1) of the PPPA. The purpose of the press statement was to inform the public at large of the existence of the prohibitory order, the reasons for making the order, and the various stipulated acts if contravened by any person would amount to an offence that is punishable under s. 8(2) of the PPPA.

Findings Of The Court Of Appeal

[49] The Court of Appeal made the following findings. They first held that while greater deference would be paid to the exercise of discretion of the Minister in matters of security of the country and public order, the court

nevertheless had the power to scrutinise such decisions under the established grounds of review including reviewing the decision for substance *ie*, merits and not only the process. The Court of Appeal recognised that the Minister was exercising a discretionary power well within his jurisdiction under s. 7(1) of the PPPA.

[50] The Court of Appeal secondly held that while in the instant case, the court was not precluded from examining the evidence to determine whether the decision to ban the comic book, though a legal act, in the sense that the Minister was empowered to do so under s. 7(1) of the PPPA, the decision was so unreasonable that a similarly circumstanced Minister would not have arrived at the same decision. In administrative law language, the prohibitory order was struck down based on an irrationality error. It is abundantly clear to any reader of the judgment that the prohibitory order was not struck down on an illegality or bad faith or *mala fide* on the part of the Minister.

[51] The question the Court of Appeal said was crucial in the appeal before them further amplifies that the falsity of the Minister's statements was not an issue:

> To our mind, **the crucial question is not whether the book had promoted the BRI or expressed support for socialism as practised in China or whether it contained historical inaccuracies**. The question is whether the book was likely to prejudice or had the potential or had prejudice public order and alarm public opinion.
>
> (emphasis added)

[52] Thus, there was no finding whether the statements were false or expressed support for communism or socialism as practised in China. The only issue is whether the exercise of discretion of the Minister was irrational on the question whether the book was likely to prejudice or had the potential to prejudiced public order and alarmed public opinion.

[53] The Court of Appeal then carried out a detailed examination of the affidavit of the Minister, wherein the Minister had specifically identified the various pages of the comic book that purportedly support the Minister and ultimately came to the following findings:

> [26] In respect of the allegation that the comic book promoted communism and supported its cause, we note that the Minister did not refer in his affidavit to any particular content of the comic book to show that to be the case. Instead, there is a general statement that the appellant promoted communist ideology in the comic book.
>
> [28] We have perused the above-mentioned averments and the content of the comic book. *The Minister may have good reason to disagree with the appellant's interpretation of history, his worldview, or his comments on current affairs particularly in respect of China's BRI policy and its treatment of the Muslim minority in Xinjiang. The Minister may also have reason to disagree with the suggestion that a survey showed that a certain percentage of Malaysians sympathised*

> *with the cause of the Islamic State. It may well be that professional historians, the majority of the public, or even us, may disagree with the appellant's take on history and current events*. But surely disagreement with someone's view, even if justified on the basis that the author did not get the facts right or misinterpreted them, cannot be a reason to ban a book. Otherwise, the constitutional right to freedom of expression would be rendered illusory. It would even imperil academic research. In this context, we note that the Minister had disagreed with the view expressed in the comic book that diplomatic relations between the Ming Dynasty of China and the Malacca Sultanate enabled the latter to prosper. We would reiterate that, viewed objectively, there is nothing incendiary in the book that pits one race against another insults anyone's racial or religious sentiment, or stokes racial tension as alleged in the affidavit of the Minister.
>
> (emphasis added)

[54] There were two reasons given by the Court of Appeal in its decision for the finding of irrationality. The first was that the court's commitment to freedom of expression demands, that, freedom of expression cannot be suppressed unless the situation created by allowing the freedom is pressing and the community interest is endangered and the second was that the anticipated danger should have proximate and direct nexus with the expression contemplated and likened it to an equivalent of a "spark in a powder keg" that would incite racial unrest, disharmony or riots. This was coupled with the fact that the Court of Appeal, observed that the comic book was in circulation for some six months with no untoward incident that made the fears held by the Minister of racial unrest and disharmony unfounded. The Court of Appeal was also not impressed with the 81 police reports lodged against the comic book which factor was given great weight by the learned High Court Judge. The Court of Appeal said:

> In our opinion, it is unacceptable if the number of police reports or adverse responses on social media is considered an important yardstick by which a decision can be made to ban a publication.

[55] Having identified the findings, the next step is to determine whether the same constitutes malicious falsehood and defamation in private law. It must be noted that malicious falsehood and defamation are distinct torts. They may arise from the same fact but the elements to prove each tort are different.

Decision On Malicious Falsehood

[56] I found that the findings of the Court of Appeal when quashing the prohibitory order did not constitute the tort of malicious falsehood. My reasons are as follows. Firstly, the elements of the tort of malicious falsehood have not been satisfied. The elements of the tort of malicious falsehood according to the decision of the Federal Court in *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019] 3 CLJ 729 are:

(i) the statements made by a defendant in the article complained of were false;

(ii) the defendant had uttered and published the words in the first article maliciously *ie*, without just cause or excuse; and

(iii) that special damage has followed as the direct and natural result of the publication.

[57] A careful perusal of the judgment of the Court of Appeal will reveal that the elements of the falsity of the statements and malice on the part of the Minister were not in issue before the court. As a result, no findings were made in respect of both these elements. Therefore, the claim for malicious falsehood was not made out from the successful judicial review application which was based solely on irrationality of the exercise of discretion by the Minister to ban the comic book.

[58] Secondly, the facts show that the Minister had no malice toward the applicant. In *Raub Australian Gold Mining Sdn Bhd* (followed by the Court of Appeal in *Fitters Diversified Bhd & Ors v. Mohd Roslan Mahayudin & Ors* [2024] 4 CLJ 657), the word "malice" as defined in *Osborn's Concise Dictionary* (7th Ed) was accepted to mean:

> [41] ... Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law, an act is malicious if done intentionally without just cause or excuse. *So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced, or unfair* (*Horrocks v. Lowe* [1972] 1 WLR 1625)
>
> [42] In law, an act is malicious if done intentionally without just cause or excuse. *So long as a person believes in the truth of what he says and is not reckless, "malice" cannot be inferred from the fact that his belief is unreasonable, prejudiced, or unfair (see: Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor And Other Appeals* [2008] 3 MLJ 492)
>
> (emphasis added)

[59] In the analysis of the Court of Appeal, the Minister believed in the truth of what he said and was not reckless. Further, and more importantly, malice cannot be inferred from the fact that the Minister's belief is unreasonable, prejudiced, or unfair (see *Raub Australian Gold Mining Sdn Bhd and Fitters Diversified Bhd*). To recall, the Court of Appeal found the Minister's belief of the facts he relied on was unreasonable but not that the facts were false. In the circumstances, the claim for damages based on malicious falsehood has no basis and for that reason dismissed.

Decision On Defamation

[60] I found that the findings of the Court of Appeal when quashing the prohibitory order did not constitute defamation. My reasons are as follows. Firstly, the elements of defamation have not been satisfied. In the instant case, we are dealing with "libel" – a permanent form of publication *ie*, the

press statement. The key elements of defamation re libel are trite and have recently been reiterated by the Federal Court in *Raub Australian Gold Mining Sdn Bhd* as follows:

(i) the plaintiff must show that the statement bears defamatory imputations;

(ii) the statement must refer to or reflect upon the plaintiff's reputation; and

(iii) the statement must be published to a third person by the defendant.

[61] A careful perusal of the judgment of the Court of Appeal will reveal that the elements of defamation were not in issue before the court. No findings were made on either of these elements. Therefore, the claim for defamation was not made out from the successful judicial review application which was based solely on the exercise of discretion by the Minister to ban the comic book. This was in line with the averment in the respondent's affidavit in reply (encl. 45 para. 15) where it was said that at the substantive stage of the judicial review, no elements of the defamation were ventilated or proved.

[62] Secondly, the Minister's sole focus in the press statement was: (i) that the comic book was a prohibited publication; (ii) any person committing any of the prohibited acts concerning the comic book act commits an offence and is liable to punishment; (iii) and his reasons as to why the comic book was to be banned. There was nothing said of the applicant in the press release. The applicant was not mentioned at all and neither was anything said in the press release concerning the applicant which would refer to or reflect upon his reputation. The press release concerned the contents of the comic book and not the applicant who authored the book.

[63] Thirdly, the claim of defamation raised without pleading and particulars in the O. 53 statement have deprived the applicant of pleading the defence of privilege, absolute privilege, or at the very least qualified privilege. If raised privilege would be an absolute defence to the claim of defamation unless malice is proved. These are issues of fact not suitable to be determined by affidavit evidence in judicial review proceedings. The defendant cannot be deprived of raising the defence of absolute privilege or qualified privilege. In the circumstances, the claim for damages based on malicious falsehood has no basis and for that reason, dismissed.

Misfeasance In Public Office

[64] Like the claims for conspiracy to injure, breach of statutory duty, and malicious falsehood, the claim for misfeasance in public office suddenly reared its head during submissions. I will deal with this claim for damages the same way as the other claim for damages.

[65] I found that the findings of the Court of Appeal when quashing the prohibitory order did not constitute misfeasance in public office. My reasons are as follows. Firstly, the elements of the tort of misfeasance in public office have not been satisfied. In the recent Federal Court decision in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337, it was said that the elements of misfeasance in public office and its role was laid down by the House of Lords in *Three Rivers District Council And Others v. Governor And Company Of The Bank Of England (No 3)* [2003] 1 AC 1. The tort, it was said, is founded on the unifying element of abuse of public power in bad faith. The rationale of the tort is that in a legal system based on the rule of law, executive or administrative power, may be exercised only for the public good and not for ulterior and improper purposes. The Federal Court further elaborated on the tort as follows:

> [185] It is therefore an intentional tort. *The element which receives the most emphasis is that of bad faith, ie, the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons*. It is also the element which makes this tort hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to remain on the record. *In many instances, the plea is struck out as it is simply insufficient. This is because it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort*. It requires outrageous conduct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.
>
> (emphasis added)

[66] In *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3)* [2003] 1 AC 1, the elements of the tort of misfeasance in public office are set out and summarised in *Tony Pua Kiam Wee* as follows:

> (a) the defendant is a public officer
>
> (b) the exercise of power by the public officer
>
> (c) the public officer either:
>
> (i) acted knowing that he had no power to do the act complained of and that the act would probably injure the plaintiff; this type of case involves bad faith in as much as the public officer does not have an honest belief that his act is lawful (*ie*, untargeted malice by recklessly being indifferent as to the limit of their public power or authority); or
>
> (ii) conduct specifically intended to injure a person or persons: this type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive (*ie*, targeted malice by abusing his public power or authority).

[67] In his written submissions (encl. 54 at para. 22) it was alleged that the Minister's decision to issue the prohibitory order was tainted with bad faith and it amounts to an abuse of power by a public authority with the intention of injuring the applicant (*ie*, targeted malice). In the executive summary (encl. 58), the applicant further expended on his submission of targeted malice by stating:

> The 1st respondent is a public officer, a position held by Tan Sri Muhyiddin Yassin at the material time and we submit had in bad faith as a public officer issued the prohibitory order dated 23.10.2019 for his own interest and political mileage. The 1st respondent had intentionally used the prohibitory order as a political leverage to advance his political interests. Tan Sri Muhyiddin Yassin ultimately became the Prime Minister of Malaysia in 2020 until his resignation. The 1st respondent was aware that his act of issuing the prohibitory order would harm the applicant. The Court of Appeal's judgment supports the applicant's case as submitted above. As a result, the applicant suffered reputational loss, loss of income, loss of opportunity, and legal costs incurred.

[68] A careful perusal of the judgment of the Court of Appeal will reveal that the elements of targeted malice were not in issue and neither was bad faith or malice in respect of misfeasance in public office established. The submission of the applicant that the Court of Appeal's judgment supports the applicant's case is not correct. No findings were made on the elements of targeted malice or bad faith or malice on the part of the Minister. One only has to read the Court of Appeal's judgment to see that the submission of the applicant was completely devoid of merit.

[69] Therefore, the claim for damages predicated on misfeasance of public office is not made out from the successful judicial review application which was based solely on the exercise of discretion by the Minister to ban the comic book.

Conclusion

[70] Following the Court of Appeal's decision in *The Edge Communications Sdn Bhd* that an assessment of damages exercise is not confined to merely calculating the figures to constitute damages but also to see whether the threshold of O. 53 r. 5 has been satisfied as a juridical issue I find that the claim of damages predicated on conspiracy, defamation, malicious falsehood, breach of statutory duty and misfeasance in public office not established by the decision of the Court of Appeal when allowing the prayers sought by the applicant (encl. 1) have not satisfied O. 53 r. 5. The assessment of damages is misconceived in law and dismissed for the above reason.